MARK F. HAZELWOOD, SBN 136521
DIRK D. LARSEN, SBN 246028
LOW, BALL & LYNCH
505 Montgomery Street, 7th Floor
San Francisco, California 94111-2584
Telephone (415) 981-6630
Facsimile (415) 982-1634

Attorneys for Defendant
CITY OF CLEARLAKE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHERRILL FOSTER, HOWARD FOSTER, SHEILA BURTON, and MINNIE BURTON, Plaintiffs, v. SHANNON EDMONDS, LORI TYLER, COUNTY OF LAKE, CITY OF CLEARLAKE, and DOES 1-100, Defendants.	Case No.: C-07-5445-EMC DEFENDANT CITY OF CLEARLAKE'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT (F.R.C.P. 12(b)(6)), OR IN THE ALTERNATIVE, MOTION FOR A.MORE DEFINITE STATEMENT (F.R.C.P. 12(e)); MEMORANDUM OF POINTS AND AUTHORITIES Date: May 21, 2008 Time: 10:30 a.m. Courtroom: C, 15th Floor Judge: Hon. Edward M. Chen

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on May 21, 2008, at 10:30 a.m., in Courtroom C of the above-entitled Court, defendant CITY OF CLEARLAKE (the "City") will move the Court for an order dismissing plaintiffs SHERRILL FOSTER, HOWARD FOSTER, SHEILA BURTON and MINNIE BURTON's ("Plaintiffs") first, second and fifth claims for relief against the City pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that the above-named claims in Plaintiffs' First Amended Complaint fail to state a claim upon which relief can be granted. In the alternative, the City

will move the Court for an order requiring Plaintiffs to provide a more definite statement of the allegations against the City pursuant to Federal Rules of Procedure, Rule 12(e).

STATEMENT OF RELIEF SOUGHT

The City hereby moves the Court for an order dismissing Plaintiffs' first, second and fifth claims for relief against the City pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that the above-named claims in Plaintiffs' First Amended Complaint fail to state a claim upon which relief can be granted. In the alternative, the City hereby moves the Court for an order requiring Plaintiffs to provide a more definite statement of the allegations against the City pursuant to Federal Rules of Procedure, Rule 12(e).

POINTS AND AUTHORITIES

TABLE OF CONTENTS

Page(s)

I. STATEMENT OF ISSUES TO BE DECIDED 1

II. STATEMENT OF RELEVANT FACTS 1

A. Background 1

B. Incident 2

C. Factual Allegations Against the City 2

D. Claims for Relief Against the City 3

III. ARGUMENT 3

A. Applicable Law 3

B. Plaintiff's First Claim for Violation of Federal Civil Rights Fails to State a Claim Upon Which Relief Can Be Granted 4

1. The FAC Does Not Allege that City Officials Engaged in Conduct that Deprived Plaintiffs of Federal Rights 4

a. The City Does Not Owe Plaintiffs or Decedents a Duty to Protect Them from Private Conduct 5

b. The State-Created Danger Doctrine Does Not Apply Because Plaintiffs Have Not Alleged That City Officials Affirmatively Placed Decedents in a More-Vulnerable Position 5

c. The FAC Does Not State Facts Sufficient to Support a Claim for Selective Protection in Violation of the Equal Protection Clause 6

2. Because Edmonds' Shooting of Decedents Did Not Constitute State Action, That Act Is Not Attributable to the City for Purposes of a § 1983 Claim 7

a. Edmonds Was Not Performing a Public Function in Selling Illicit Drugs and Shooting Decedents 7

b. Plaintiffs Do Not Plead Facts Showing that Edmonds Was a Joint Participant in a City Action 8

Page(s)

c. The FAC Does Not Plead Facts Satisfying the State-Compulsion Test 9

d. The FAC Does Not Plead Facts Satisfying the Symbiotic-Relationship Test 9

C. Plaintiffs' Second Claim for Violation of Federal Civil Rights Fails to State a Claim for Municipal Liability Under the *Monell* Doctrine 10

D. City Officials Are Entitled to Qualified Immunity from Suit and Liability for Plaintiffs' § 1983 Claims for Relief 11

E. Plaintiffs' Fifth Claim, for Violations of the California Civil Code, Fails to State a Claim Upon Which Relief Can Be Granted 12

1. Because Plaintiffs' California Claim Fails to Allege Compliance with the California Tort Claims Act, It Fails to State a Claim for Relief Against the City 12

2. The FAC Fails to Plead Its California Claim Against the City, a Public Entity, With the Requisite Specificity, and Thus Fails to Plead a Claim for Relief 13

3. The City and Its Officials Are Entitled to Statutory Immunities from Liability Under Plaintiffs' Fifth Claim for Relief 15

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Cases — Page(s)

United States Supreme Court Cases

Anderson v. Creighton
483 U.S. 635 (1987) 12

American Mfrs. Mut. Ins. Co. v. Sullivan
502 U.S. 40 (1999) 7

Blum v. Yaretsky
457 U.S. 991 (1982) 9

Board of County Comm'rs of Bryan County v. Brown
520 U.S. 397 (1997) 10

Burton v. Wilmington Park Authority
365 U.S. 715 (1951) 9

DeShaney v. Winnebago County Dept. of Social Svcs.
489 U.S. 189 (1989) 5-6

Hafer v. Melo
502 U.S. 21 (1991) 11

Jackson v. Metropolitan Edison Co.
419 U.S. 345 (1974) 7, 8

Lugar v. Edmondson Oil
457 U.S. 922 (1982) 7

Marsh v. Alabama
326 U.S. 501 (1946) 8

Monell v. Dept. of Social Svcs. of City of New York
436 U.S. 658 (1978) 10

Saucier v. Katz
533 U.S. 194 (2001) 11-12

Terry v. Adams
345 U.S. 461 (1953) 8

United States Court of Appeals Cases

Balistreri v. Pacifica Police Dept.
901 F.2d 696, 699 (9th Cir. 1990) 3-5

Brunette v. Humane Society of Ventura County
294 F.3d 1205 (9th Cir. 2002) 7-9

United States Court of Appeals Cases (continued) Page(s)

Harris v. City of Roseburg
664 F.2d 1121 (9th Cir. 1981) 8

Houghton v. South
965 F.2d 1532 (9th Cir. 1992) 12

Howerton v. Gabica
708 F.2d 380 (9th Cir. 1983) 8

In re Delorean Motor Co.
991 F.2d 1236 (6th Cir. 1993) 3, 9

Johnson v. Knowles
113 F.3d 1114 (9th Cir. 1997) 9

Kennedy v. Ridgefield
439 F.3d 1055 (9th Cir. 2006) 5

Macias v. Ihde
219 F.3d 1018 (9th Cir. 2000) 6

Munger v. City of Glasgow Police Dept.
227 F.3d 1082 (9th Cir. 2000) 6

Navarro v. Block
72 F.3d 712 (9th Cir. 1995) 6

Thomas v. Independence Township
463 F.3d 285 (3rd Cir. 2006) 12

Trevino v. Gates
99 F.3d 911 (9th Cir.1996) 10

Weisbuch v. County of Los Angeles
119 F.3d 778 (9th Circ. 1997) 3

United States District Court Cases

Cellars v. Pacific Coast Packaging, Inc.
189 F.R.D. 575 (N.D. Cal. 1999) 4

California Cases

Baughman v. State of California
38 Cal.App.4th 182, 45 Cal.Rptr.2d 82 (1995) 15

Giannuzzi v. State of California
(1993) 17 Cal.App.4th 462, 21 Cal.Rptr.2d 335 (1993) 15

California Cases (continued) Page(s)

Kemmerer v. County of Fresno
200 Cal.App.3d 1426 (1988) 15

McCarthy v. Frost
33 Cal.App.3d 872 (1973) 15

Mittenhuber v. City of Redondo Beach
142 Cal.App.3d 1(1983) 13-14

Nestle v. City of Santa Monica
6 Cal.3d 920 (1972). 13-14

People ex rel. Dep't of Transp. v. Superior Court
5 Cal.App.4th 1480 (1992) 13

State v. Superior Court (Bodde)
32 Cal.4th 1234 (2004) 13

Constitutional Provisions

U.S. Constitution, Amendment IV 3-4

U.S. Constitution, Amendment IX. 3-4

U.S. Constitution, Amendment XIV. 3-4

Federal Statutes

42 U.S.C. § 1983 ..... 1, 3-5, 7, 10

Federal Rules of Civil Procedure

Rule 12(b)(6) 1, 3-4, 11-12, 14, 16

Rule 12(e) 4, 11-12, 14, 16

California Statutes

California Civil Code

§ 51 9

§ 51.6 14

§ 51.7 ..... 1,3, 12-14

§ 52 ..... 1, 3, 12-14

California Statutes (continued) Page(s)

California Government Code

§ 815.2(b) 15
§ 815(b) 15
§ 818.2 16
§ 820.2 15
§ 821 15
§ 821.6 15
§ 845 16
§ 911.2 12
§ 900 12-13
§ 945.4 13

I. STATEMENT OF ISSUES TO BE DECIDED

This motion presents the following issues for decision: (1) whether to dismiss plaintiffs SHERRILL FOSTER, HOWARD FOSTER, SHEILA BURTON and MINNIE BURTON's ("Plaintiffs") first claim for relief against defendant CITY OF CLEARLAKE (the "City") for deprivation of federal rights under color of state law (42 U.S.C. § 1983) pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6); (2) whether to dismiss Plaintiffs' second claim for relief against the City for deprivation of federal rights under color of state law (42 U.S.C. § 1983) pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6); (3) whether to dismiss Plaintiffs' fifth claim for relief against the City for violations of California Civil Code §§ 51, 51.7 and 52; and/or (4) whether to require Plaintiffs to amend their complaint to contain a more definite statement of the factual bases for the allegations against the City as well as for the federal and state immunities of the City and its officials.

II. STATEMENT OF RELEVANT FACTS

A. Background.

Plaintiffs Sherrill Foster and Howard Foster bring their claims individually and as the mother and father, respectively, and successors in interest for their son, decedent Christian Dante Foster ("Foster") and the Estate of Christian Dante Foster. (First Amended Complaint ["FAC"], ¶ 3.) Plaintiffs Sheila Burton and Minnie Burton bring their claims individually and as the mother and grandmother, respectively, and successors in interest for decedent Rashad Laron Morris Williams ("Williams") and the Estate of Rashad Laron Morris Williams. (FAC, ¶ 3.) Foster and Williams were of African-American descent. (FAC, ¶ 20.) Defendants Shannon Edmonds ("Edmonds") and Lori Tyler ("Tyler") are adult residents of the County of Lake, and are of Caucasian descent. (FAC, ¶¶ 5, 20.) Plaintiffs do not allege that Edmonds and Tyler are employed by the City of Clearlake. They do allege, however, that unnamed Doe defendants were employees and/or agents of the other defendants, presumably including the City, and that these Doe defendants acted within the course and scope of that relationship at all material times. (FAC, ¶ 6.) In addition, they allege that "each of the Defendants was at all material times an agent, servant, employee, partner, joint venturer, co-conspirator, and/or alter ego of the remaining Defendants, and in doing the things herein alleged, was acting within the course and scope of that relationship." (FAC, ¶ 8.)

Plaintiffs allege that Edmonds and Tyler had engaged in the unlawful sale of recreational drugs between January 2004 and December 27, 2005. (FAC, ¶ 14.) They further allege that Edmonds used boys as young as 14 or 15 years old as part of his network for selling these drugs. (FAC, ¶ 14.) Edmonds and Tyler had been targets in several robbery attempts designed to steal all or part of their cache of marijuana and other drugs. (FAC, ¶ 15.)

B. Incident.

In the early morning hours of December 7, 2005, Foster and Williams "presented themselves" at the house shared by Edmonds and Tyler. (FAC, ¶¶ 13, 14.) A fight broke out, and Foster and Williams ran out of the house. (FAC, ¶ 14.) As they were running, Edmonds shot both men in the back with a firearm, resulting in their deaths. (FAC, ¶ 14.) Plaintiffs allege that the altercation and shooting were racially motivated. (FAC, ¶ 20.) They do not allege that any City employee, agent or official was present at or near the Edmonds residence at the time of the altercation and shooting. (*See* FAC, ¶¶ 13, 14.)

C. Factual Allegations Against the City.

Plaintiffs allege that the City or its employees (the unnamed Doe defendants) engaged in the following conduct prior to the incident: "allowing Edmonds and Tyler unlawfully to sell recreational drugs, to possess firearms, to use minors in unlawful sale of recreational drugs ... failing to protect persons such as Christian and Rashad ... allowing Edmonds and Tyler to use, store and/or unlawfully distribute illegal drugs from their residence[;]" "fail[ing] to force [Edmonds and Tyler] to stop illegal activities[;]" and "provid[ing] protection to Edmonds, a known drug dealer, and ... allowing the racist Edmonds to continue his illegal activity." (FAC, ¶¶ 7, 15, 20.) They further allege that "the local agency policies, customs, practices and procedures in this regard were clearly inadequate or non-existent, and were the moving force behind constitutional deprivations suffered by the aggrieved parties." (FAC, ¶ 20.)

Plaintiffs also allege that the City or its employees engaged in a number of wrongful acts after the incident. These acts relate to the investigation of the incident and ultimate prosecution of one Renato Hughes for the murder of Foster and Williams. (FAC, ¶¶ 27, 32, 34.) Plaintiffs allege that these acts resulted from City customs, policies, practices, and/or procedures as well as inadequate hiring, training,

instruction, monitoring, supervision, evaluation, investigation and discipline of its employees. (FAC, ¶¶ 32-34.) According to the FAC, these deficiencies on the part of the City "were a moving force and/or a proximate cause of the deprivations of Plaintiffs' clearly-established and well-settled constitutional rights[.]" (FAC, ¶ 35.)

D. Claims for Relief Against the City.

Plaintiffs allege three claims against the City: (1) first claim for relief, brought pursuant to 42 U.S.C. § 1983, for violation of federal civil rights, including the right to be free from unreasonable search and seizure (Fourth and Fourteenth Amendments), the right to be free from excessive force (Fourth and Fourteenth Amendments), the right to be free from the use of unlawful deadly force (Fourth and Fourteenth Amendments), the right to be free from wrongful government interference with familial relationships and the right to Plaintiffs' companionship, society and support of each other (Fourth, Ninth and Fourteenth Amendments); (2) second claim for relief, brought pursuant to 42 U.S.C. § 1983, for violation of unspecified federal rights, apparently under the *Monell* doctrine; and (3) violations of California Civil Code §§ 51, 51.7, 52, *et alia*, based on the denial of equal protection of laws under the Fourteenth Amendment on account of race, color and/or national origin. (FAC, ¶¶ 24-40, 54-58.)

III. ARGUMENT

A. Applicable Law.

Federal Rule of Civil Procedure 12 permits parties to move the court to dismiss complaints for "failure to state a claim upon which relief can be granted[.]" F.R.C.P. 12(b)(6). Dismissal of a complaint pursuant to F.R.C.P. 12(b)(6) is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). Dismissal is also proper where the complaint, on its face, discloses affirmative defenses or absolute bars to recovery. *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783, fn. 1 (9th Circ. 1997).

A court reviewing a 12(b)(6) motion accepts the facts alleged in the complaint as true. *Balistreri*, 901 F.2d at 699. But it need not accept as true conclusionary allegations or legal characterizations. *See In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993). "In practice, a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery

under *some* viable legal theory." *Id.* (emphais in original) (internal citations omitted).

Federal Rule of Civil Procedure 12(e) provides that "[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." A 12(e) motion for a more definite statement is proper where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted. *Cellars v. Pacific Coast Packaging, Inc.*, 189 F.R.D. 575, 578 (N.D. Cal. 1999).

B. Plaintiff's First Claim for Violation of Federal Civil Rights Fails to State a Claim Upon Which Relief Can Be Granted.

Plaintiffs' first claim for relief against the City is for the violation of rights guaranteed by the Fourth, Ninth and Fourteenth Amendments to the U.S. Constitution. (FAC, ¶ 24, 25.) Plaintiffs bring this claim pursuant to 42 U.S.C. § 1983, which provides that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ...

The FAC appears to pose two theories of liability under § 1983: that the acts of the unnamed City employees constitute a violation of Plaintiffs' federal civil rights, and that Edmonds and Tyler themselves acted under color of state law before and during the incident. (FAC, ¶¶ 7, 15, 20, 26.) Under neither theory, however, do Plaintiffs plead sufficient facts for the FAC to withstand a motion to dismiss pursuant to F.R.C.P. 12(b)(6). *See Balistreri*, 901 F.2d at 699.

1. The FAC Does Not Allege that City Officials Engaged in Conduct that Deprived Plaintiffs of Federal Rights.

The FAC alleges that City officials engaged in the following conduct prior to the incident: "allowing Edmonds and Tyler unlawfully to sell recreational drugs, to possess firearms, to use minors in unlawful sale of recreational drugs ... failing to protect persons such as Christian and Rashad ... allowing Edmonds and Tyler to use, store and/or unlawfully distribute illegal drugs from their residence[;]" "fail[ing] to force [Edmonds and Tyler] to stop illegal activities[;]" and "provid[ing] protection to Edmonds, a known drug dealer, and ... allowing the racist Edmonds to continue his illegal activity."

(FAC, ¶¶ 7, 15, 20.) In essence, Plaintiffs allege that City officials violated their federal rights by failing to enforce city, state and/or federal laws, and by failing to protect Plaintiffs from Edmonds. As discussed in the following sections, such conduct does not amount to an actionable deprivation of Plaintiffs' rights.

a. The City Does Not Owe Plaintiffs or Decedents a Duty to Protect Them from Private Conduct.

As a general rule, municipalities have no constitutional duty to provide services to individuals, even if they possess information that such individuals might be at risk from crime. *DeShaney v. Winnebago County Dept. of Social Svcs.*, 489 U.S. 189, 195-197 (1989); *Balistreri,* 901 F.2d at 699-700. The Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *DeShaney*, 489 U.S. at 195. Accordingly, the alleged failure of City officials to protect Foster and Williams cannot form the basis for § 1983 liability.

The assertion that the City officials' "protection" of Edmonds or permission of his activities deprived Plaintiffs of federal rights is equally without merit. To allow such an assertion would make the respective municipality, county or state liable under § 1983 every time one person, even a suspected criminal, commits a crime against another. The assertion is also at odds with *DeShaney's* holding that the Due Process Clause is a limitation on state action, not a source of affirmative obligations. *See id.* Accordingly, the City officials' alleged conduct is insufficient to form the basis of a § 1983 claim.

b. The State-Created Danger Doctrine Does Not Apply Because Plaintiffs Have Not Alleged That City Officials Affirmatively Placed Decedents in a More-Vulnerable Position.

Under the "state-created danger" doctrine, a governmental entity may have an affirmative constitutional duty to protect certain individuals from private actors when its conduct places those individuals in a more-vulnerable position than they otherwise would have been. For example, the Ninth Circuit found a Due Process violation where a police officer told an alleged molester of the accuser's allegations, thus making the particular accuser more vulnerable to the alleged molester's retaliation. *Kennedy v. Ridgefield*, 439 F.3d 1055, 1058, 1062-1063 (9th Cir. 2006). Similarly, officers placed an

individual in a more dangerous position than they found him—resulting in a Due Process violation—when they ejected him from a bar late on a cold night and provided him with no means of reaching home. *Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082, 1084-1087 (9th Cir. 2000).

Here, Plaintiffs do not allege facts demonstrating that City officials placed these particular decedents in a more-vulnerable position than they otherwise would have been. On the contrary, Foster and Williams simply "presented themselves" at the Edmonds residence, without any coercion, encouragement or even participation on the part of City officials. (FAC, ¶ 14.) There is no indication that City officials had knowledge of decedents' presence at Edmonds' residence, of their intention to present themselves there, or even of their presence within the City. Accordingly, City officials engaged in no conduct that can have increased the vulnerability of these particular plaintiffs to Edmonds' actions. The state-created danger doctrine thus does not apply, and Plaintiffs cannot sustain a claim for § 1983 relief under that theory.

c. The FAC Does Not State Facts Sufficient to Support a Claim for Selective Protection in Violation of the Equal Protection Clause.

The *DeShaney* court acknowledged that the "State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney*, 489 U.S. at 197, fn. 3. Here, Plaintiffs have alleged that City officials protected Edmonds, who is of Caucasian descent, and that they failed to protect Foster and Williams, who were of African-American descent. (FAC, ¶ 20.) They thus appear to be alleging an Equal Protection violation based on selective denial of protective services. However, they fail to allege facts that would support this allegation.

In *Navarro v. Block*, 72 F.3d 712, 713, 716-717 (9th Cir. 1995), for example, the plaintiff pleaded a possible Equal Protection violation by alleging that, in response to her call involving possible domestic violence, the 911 dispatcher did not classify the situation as an "emergency," thus discriminating against abused women. Similarly, in *Macias v. Ihde*, 219 F.3d 1018, 1021-26, 1028 (9th Cir. 2000), the plaintiff stated a potential Equal Protection violation where, after numerous calls to and other contacts with the local police regarding her estranged husband's threatening behavior, the police failed to protect her due to possible discrimination against women and Latinos.

Here, by contrast, there is no allegation that City officials had any opportunity at all to protect Foster and Williams before or during the incident. Plaintiffs do not allege that City officials were alerted to Foster and Williams' presence at the Edmonds residence, or even to their presence in the City. Plaintiffs do not even allege that, prior to or during the incident, any City official knew that Foster and Williams were of African-American descent. Based on the allegations in the FAC, it was impossible for City officials to selectively deny protection to Foster and Williams based on their race, as City officials had neither notice of their race nor of their need for protection. Accordingly, Plaintiffs' FAC fails to state a claim for violation of Equal Protection based on selective denial of protective services.

2. Because Edmonds' Shooting of Decedents Did Not Constitute State Action, That Act Is Not Attributable to the City for Purposes of a § 1983 Claim.

Section 1983 provides a cause of action only for deprivations of federal rights by persons acting "under color of [state law]." 42 USC § 1983. Generally, the "under color of state law" requirement is the same as the "state action" requirement for Due Process violations. *Lugar v. Edmondson Oil*, 457 U.S. 922, 928-29 (1982). A private individual or entity may be considered a state actor where the "state has exercised such coercive power or has provided such significant encouragement, either overt or covert, that the choice must be that of the State." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). In other words, state action exists where, due to the relationship between the private actor and the state, the private actor's conduct may be fairly attributable to the state. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358 (1974). The inquiry is not whether the private individual was a state actor, but whether he performed a state action in the instance at issue. *American Mfrs.*, 526 U.S. at 51.

The U.S. Supreme Court and the Ninth Circuit Court of Appeals have employed four tests for determining whether a private actor's conduct constitutes state action: (1) performance of a public function; (2) joint participation/government nexus; (3) state compulsion or encouragement; and (4) symbiotic relationship between the state and the private actor.

a. Edmonds Was Not Performing a Public Function in Selling Illicit Drugs and Shooting Decedents.

A private person or entity can act under color of state law when performing a function that "has been 'traditionally the exclusive prerogative of the State.'" *Brunette v. Humane Society of Ventura*

County, 294 F.3d 1205, 1214 (9th Cir. 2002) (quoting *Jackson*, 419 U.S. at 353 (1974)). Classic examples of a public function in this sense include providing utilities, water, etc., and conducting elections for public officials. *See Marsh v. Alabama*, 326 U.S. 501 (1946); *see Terry v. Adams*, 345 U.S. 461 (1953).

Here, Plaintiffs allege that Edmonds and Tyler sold unlawful drugs via a network of teenage boys, and that Edmonds shot Williams and Foster in a racially motivated attack. (FAC, ¶¶ 14, 20.) Without belaboring the point, it is obvious that neither of these acts constitutes a function that has been traditionally the exclusive prerogative of the state. *See Brunette*, 294 F.3d at 1214. Accordingly, Plaintiffs' allegations fail to satisfy the public function test.

b. Plaintiffs Do Not Plead Facts Showing that Edmonds Was a Joint Participant in a City Action.

To be engaged in joint action under the joint participation test, the "private party must be a 'willful participant' with the State or its agents in an activity which deprives others of constitutional rights." *Brunette*, 294 F.3d at 1211 (internal citation omitted). But a private party is liable under this theory "only if its particular actions are 'inextricably intertwined' with those of the government." *Id.* (internal citations omitted).

In *Howerton v. Gabica*, 708 F.2d 380, 384 (9th Cir. 1983), the Ninth Circuit found joint participation where police officers' presence at a private landlord's eviction "created an appearance that the police sanctioned the officer's conduct." But mere acquiescence by the police to "stand by" a private entity's repossession procedure is insufficient to constitute state action; instead, the police must actively intervene in and aid the repossession. *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981).

Here, Plaintiffs do not allege that City officials were even present at the scene of the incident, or at Edmonds' residence any time before the incident. No City official thus stood by Edmonds' activities or created the appearance that the City sanctioned his conduct. In addition, Plaintiffs plead no facts indicating that Edmonds was a "willful participant" with the City or its agents. *See Brunette*, 294 F.3d at 1211. Instead, they recite merely boilerplate, conclusionary allegations of a conspiracy as well as that City officials "protected" Edmonds—allegations that are insufficient to plead a claim for relief. *See*

FAC, ¶¶ 8, 20; *see In re Delorean Motor Co.*, 991 F.2d at 1240. Plaintiffs thus fail to plead facts sufficient to satisfy the joint participation test.

c. The FAC Does Not Plead Facts Satisfying the State-Compulsion Test.

Under the state-compulsion test, state action may be found "where the state has 'exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private actor's] choice must in law be deemed to be that of the State.'" *Johnson v. Knowles*, 113 F.3d 1114, 1119 (9th Cir. 1997) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Mere approval of or acquiescence in the actions of a private party is not sufficient to justify holding the state responsible; instead, the state must actively contribute to the performance of the alleged act(s). *Blum*, 457 U.S. at 1004-1005.

Here, Plaintiffs have not pleaded facts indicating that City officials in any way exercised coercive power over Edmonds, or provided significant encouragement to him. As discussed in section III(B)(1), *supra*, Plaintiffs allege that City officials "protected" Edmonds and "permitted" him to sell unlawful drugs. (FAC, ¶¶ 7, 20.) But these allegations—which themselves do not constitute violations of Plaintiffs' rights—at most represent mere approval of or acquiescence in Edmonds' actions, and are thus insufficient to satisfy the state-compulsion test. *See Blum*, 457 U.S. at 1004-1005.

d. The FAC Does Not Plead Facts Satisfying the Symbiotic-Relationship Test.

Under the symbiotic-relationship test, a private actor may act under color of state law where "the government has 'so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity.'" *Brunette*, 294 F.3d at 1213 (quoting *Burton v. Wilmington Park Authority*, 365 U.S. 715, 725 (1951)). "*Burton* teaches that substantial coordination and the integration between the private entity and the government are the essence of a symbiotic relationship." *Id.* Significant financial integration is another factor. *Id.*

Here, Plaintiffs have not pleaded substantial coordination and integration between between Edmonds and City officials, aside from the conclusionary boilerplate to the effect that they were "co-conspirators." *See* FAC, ¶¶ 8, 20; *see In re Delorean Motor Co.*, 991 F.2d at 1240. They have also not pleaded significant financial integration between the City and Edmonds. Accordingly, the FAC fails to

plead facts that would satisfy the symbiotic-relationship test.

Because Plaintiffs have not sufficiently pleaded facts that would permit Edmonds' and Tyler's activities to be considered state action under any recognized test, his conduct cannot be attributed to the City. Accordingly, the FAC's first claim for relief does not state a claim against the City under the theory that Edmonds and Tyler acted under color of law.

C. Plaintiffs' Second Claim for Violation of Federal Civil Rights Fails to State a Claim for Municipal Liability Under the *Monell* Doctrine.

A municipal entity cannot be held liable for unconstitutional acts of its officers based solely on the doctrine of respondeat superior. *Monell v. Dept. of Social Svcs. of City of New York*, 436 U.S. 658, 694 (1978). A municipality may be held liable for an official policy or informal custom that led to the unconstitutional acts. *Id.* at 690-94. The custom must be so "persistent and widespread" that it constitutes a "permanent and well settled city policy." *Id.* at 691. Indeed, "liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.1996). Moreover, the municipality's custom, policy, practice, or deliberately indifferent training, supervision or hiring must be the actually cause the deprivation of the plaintiff's federal rights; it must be the "moving force" behind the employees' conduct resulting in the deprivation. *Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997).

Here, Plaintiffs' second claim for relief, for violation of federal rights pursuant to 42 U.S.C. § 1983, is full of boilerplate allegations attempting to satisfy the requirements for municipal liability discussed in the preceding paragraph. (*See* FAC, ¶¶ 31-40.) What the claim lacks entirely, however, is any facts supporting a causal connection between the alleged policy, custom or practice and the alleged deprivation of Plaintiffs' rights. As a preliminary matter, many of the alleged policies or customs appear to be based on events that took place only after the incident in question. For example, the claim refers to improper investigation practices that seem to relate to the post-incident investigation. (*See* FAC, ¶ 32.) And it specifically refers to the prosecution of Renato Hughes for the killing of Foster and Williams, conduct that can only have taken place after the incident. (FAC, ¶ 34.) Policies and practices based

solely on conduct occurring after the incident cannot, in fact or logic, be the "moving force" behind the incident itself.

Even assuming that the alleged policies and practices refer to conduct before the incident, the claim—and the entire FAC—simply fail to demonstrate a causal connection between such policies and the occurrence of the incident. As discussed in sections III(B)(1)(b) and (c), above, the FAC does not allege that any City official knew, prior to the incident, that Foster and Williams were in Clearlake on the morning in question, that they were of African-American descent, that they had presented themselves at Edmonds' residence, that an altercation ensued, and that Edmonds shot Foster and Williams. Regardless of the City's policy, practice or training concerning such encounters, no City official can have implemented such policy or practice, or demonstrate such deficient training, because no City official had the opportunity to do so on the morning in question. Accordingly, despite Plaintiffs' conclusionary allegation that City policy was the "moving force" behind the alleged deprivations, Plaintiffs' *Monell* claim does not satisfy the causation requirement. The claim should thus be dismissed pursuant to F.R.C.P. 12(b)(6). Alternatively, Plaintiffs should be required to amend their complaint to provide a more definite statement establishing the requisite causation pursuant to F.R.C.P. 12(e).

D. City Officials Are Entitled to Qualified Immunity from Suit and Liability for Plaintiffs' § 1983 Claims for Relief.

Qualified immunity is an affirmative defense available to officials sued pursuant to 42 U.S.C. § 1983 in their individual capacity. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Qualified immunity is not just immunity from liability but also from suit, meaning "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (internal citation omitted). Accordingly, it is an appropriate issue for determination on a motion to dismiss. *See id.* at 201.

The qualified immunity analysis has two prongs. First, the court must ask whether "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. Here, as discussed in section III(B), above, Plaintiffs have not sufficiently pleaded that any City official deprived them of a federal right.

Even assuming that Plaintiffs had sufficiently pleaded the deprivation of a federal right, they have the initial burden of proving that the right in question was clearly established—the second prong of

the qualified immunity analysis. *Houghton v. South*, 965 F.2d 1532, 1534 (9th Cir. 1992). This proposition must be made under the specific context of the case, not as a broad proposition. *Saucier*, 533 U.S. at 201-202; *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987). Otherwise "[p]laintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violations of extremely abstract rights." *Anderson*, 483 U.S. at 639. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... but it is to say that in the light of the pre-existing law the unlawfulness must be apparent." *Id.* at 640.

Here, Plaintiffs have failed to plead any facts reflecting actions taken by City officials, other than protecting Edmonds, failing to protect Foster and Williams, and not forcing Edmonds to cease his illicit activities. (FAC, ¶¶ 7, 15, 20.) As discussed in the previous sections, these acts do not result in violations of Plaintiffs' federal rights. If Plaintiffs seek to establish the violation of clearly established federal rights, they should be required to amend their complaint to include facts that would enable the qualified immunity issue to be resolved at this early stage of the litigation. *See Saucier*, 533 U.S. at 200-201; *see Thomas v. Independence Township*, 463 F.3d 285, 301 (3rd Cir. 2006). Accordingly, the City's motion to dismiss pursuant to F.R.C.P. 12(b)(6) or, alternatively, motion for a more definite statement pursuant to F.R.C.P. 12(e) should be granted.

E. Plaintiffs' Fifth Claim, for Violations of the California Civil Code, Fails to State a Claim Upon Which Relief Can Be Granted.

Plaintiffs' fifth cause of action alleges that the City, or its officials, violated "California Civil Code §§ 51, 51.7, 52, et alia," resulting in injuries and damages to Plaintiffs. (FAC, ¶ 55.) This claim fails to state facts sufficient to constitute a cause of action under California law because, as discussed in the sections below, it fails to comply with the requirements of the California Tort Claims Act (California Gov't Code §§ 900 *et seq*) and because the City and its officials are entitled to statutory immunities from liability.

1. Because Plaintiffs' California Claim Fails to Allege Compliance with the California Tort Claims Act, It Fails to State a Claim for Relief Against the City.

Government Code § 911.2 provides that a "claim relating to a cause of action for death or for

injury to person or to personal property ... shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action." Under § 945.4, "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented ... until a written claim therefor has been presented to the public entity and has been ... rejected[.]" Moreover, the California Supreme Court has held that "failure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action." *State v. Superior Court (Bodde)*, 32 Cal.4th 1234, 1239, 13 Cal.Rptr.3d 534 (2004).

Plaintiffs' FAC acknowledges that the City is a public entity. (FAC, ¶ 5.a.) However, the FAC fails to allege or excuse compliance with Government Code §§ 900 *et seq.* (*See* FAC.) Accordingly, the FAC fails to state any state-law cause of action against the City and should thus be dismissed.

2. The FAC Fails to Plead Its California Claim Against the City, a Public Entity, With the Requisite Specificity, and Thus Fails to Plead a Claim for Relief.

California Government Code § 815 provides as follows: "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Because recovery against a public entity is based on statute, the complaint must set forth facts sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied; general allegations are inadequate. *Mittenhuber v. City of Redondo Beach*, 142 Cal.App.3d 1, 5, 190 Cal.Rptr. 694 (1983). Failing to set forth such sufficiently detailed facts prevents the public entity from determining the theory of liability as well as from determining whether the complaint varies from the plaintiff's prior Tort Claims Act claim.[1] *People ex rel. Dep't of Transp. v. Superior Court*, 5 Cal.App.4th 1480, 1484-1486, 7 Cal.Rptr.2d 498 (1992). In addition, facts supporting separate theories of liability must be pleaded separately. *Nestle v. City of Santa Monica*, 6 Cal.3d 920, 939, 101 Cal.Rptr. 568 (1972).

Plaintiffs' fifth claim is based on violations of California Civil Code §§ 51, 51.7, 52, "et alia[.]" California Civil Code § 51 provides, in possibly relevant part:

[1]Plaintiffs Sheila Burton, Howard Foster and Sherrill Foster have presented claims to the City, but in those claims they allege that the deaths of Foster and Williams resulted from the failure to provide medical services, not from the conduct now alleged in the FAC.

> (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

California Civil Code § 51.7 provides, in relevant part:

> (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

California Civil Code § 52 provides, in relevant part:

> (a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages ... suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.
>
> (b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right ...[.]

Here, Plaintiffs have pleaded no additional facts in their fifth claim for relief; instead, they rely on the factual allegations in the rest of the FAC. (*See* FAC, ¶ 54.) As discussed at length above, these facts, with respect to the City, are that City officials protected Edmonds and Tyler, failed to protect Williams and Foster, and permitted Edmonds and Tyler to engage in illegal activities. (FAC, ¶¶ 7, 15, 20.) These general allegations fall far short of satisfying each element of liability under the respective statutes. *See Mittenhuber*, 142 Cal.App.3d at 5. In addition, the FAC does not separately plead facts supporting separate theories of liability. *See Nestle*, 6 Cal.3d at 939. Accordingly, Plaintiffs' fifth claim for relief fails to state facts sufficient to constitute a cause of action against the City under California law and should thus be dismissed pursuant to F.R.C.P. 12(b)(6). Alternatively, Plaintiffs should be required to plead facts in conformance with California law pursuant to F.R.C.P. 12(e).

///

///

3. The City and Its Officials Are Entitled to Statutory Immunities from Liability Under Plaintiffs' Fifth Claim for Relief.

In addition to meeting the Tort Claims Act's specificity requirements, a complaint against a public entity must plead facts sufficient to show that the claim is beyond the scope of any applicable statutory immunity. *Giannuzzi v. State of California* (1993) 17 Cal.App.4th 462, 467, 21 Cal.Rptr.2d 335 (1993). California Government Code 815(b) provides:

> (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

California Government Code 815.2(b) provides:

> (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

Accordingly, where a City official is immune from liability, the City is immune as well.

To the extent that the FAC alleges that City officials are liable for failing to force Edmonds to cease his illegal activities prior to the incident, the discretionary-act immunity provided by Government Code § 820.2 applies. *McCarthy v. Frost*, 33 Cal.App.3d 872, 875, 109 Cal.Rptr. 470 (1973) (discretionary acts include decisions whether to arrest or take some other form of protective action less drastic than arrest). In addition, Government Code § 821 provides that"[a] public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment," thus immunizing City officials from any alleged failure to enforce the law against Edmonds.

To the extent the FAC alleges improper post-incident investigation procedures, Government Code § 821.6's prosecutorial immunity applies. Government Code § 821.6 is a broad immunity that encompasses all conduct related to the investigation and filing of charges, including investigations by police officers. *See, e.g., Baughman v. State of California*, 38 Cal.App.4th 182, 192, 45 Cal.Rptr.2d 82 (1995). Section 821.6 is applied to all stages of investigations, from preliminary inquiries through hearings, regardless of whether the investigation is for criminal or civil offenses. *See Kemmerer v. County of Fresno*, 200 Cal.App.3d 1426, 1436-1437, 246 Cal.Rptr. 609 (1988).

///

The City itself enjoys similar immunities from liability under Plaintiffs' state-law claim. Government Code 818.2 provides that "[a] public entity is not liable for any injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." And Government Code § 845 provides that

> [n]either a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service.

Here, Plaintiffs not only fail to plead facts showing that their California claim is beyond applicable statutory immunities, but the facts they do plead show that the statutory immunities do apply. Accordingly, Plaintiffs' fifth claim for relief against the City should be dismissed with prejudice. Alternatively, Plaintiffs should be required to provide a more definite statement demonstrating that their claims are beyond the scope of the statutory immunities.

IV. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court grant its motion to dismiss pursuant to F.R.C.P. 12(b)(6) and issue an order dismissing Plaintiffs' first, second and fifth claims against it with prejudice. Alternatively, the City respectfully requests that the Court grant its motion for a more definite statement pursuant to F.R.C.P. 12(e) and issue an order requiring Plaintiffs to truthfully plead facts that sufficiently state claims for relief against the City and that enable the City reasonably to answer the allegations.

Dated: April 10, 2008.

LOW, BALL & LYNCH

By _____
MARK F. HAZELWOOD
DIRK D. LARSEN
Attorneys for Defendant
CITY OF CLEARLAKE